Supreme Court, U.S.
FILED
JUL 5 1979
MICHAEL RODAK, JR., CLERK

APPENDIX

IN THE
Supreme Court of the United States

OCTOBER TERM, 1979

No. 78-1268

George Martinez, et al.,

Appellants,

—v.—

State of California, et al.,

Appellees.

ON APPEAL FROM THE CALIFORNIA COURT OF APPEAL, FOURTH APPELLATE DISTRICT, DIVISION ONE

FILED FEBRUARY 13, 1979

PROBABLE JURISDICTION NOTED MAY 21, 1979

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FILED
BUSINESS DIVISION
MAY 25 1976
ROBERT D. ZUMWALT
CLERK, SAN DIEGO COUNTY
CALIFORNIA

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN DIEGO

GEORGE MARTINEZ, PATRICIA MARTINEZ, MICHELLE MARTINEZ by her Guardian Ad Litem GEORGE MARTINEZ, and MATTHEW MARTINEZ, by his Guardian Ad Litem, GEORGE MARTINEZ, Plaintiffs, vs. THE STATE OF CALIFORNIA, RAYMOND PROCUNIER, HENRY KERR, BERNARD FORMAN, CURTIS LYNUM, L. M. EDMAN, EDWARD BARLES, and DOES I through L, Inclusive, Defendants.	CASE NO. 382460 COMPLAINT FOR DAMAGES FOR WRONGFUL DEATH AND FOR CIVIL RIGHTS VIOLATION

COMES NOW Plaintiffs and complain and allege as follows:

I

That Plaintiff MICHELLE MARTINEZ, age 15, and Plaintiff MATTHEW MARTINEZ, age 13, are minors and by Order of the above-entitled Court duly given and made on May 25, 1976, Plaintiff, GEORGE MARTINEZ, was duly appointed Guardian Ad Litem of said minors for the purposes of bringing this action and ever since has been, and still is, the duly appointed acting Guardian Ad Litem of said minors.

II

That prior to the commencement of this action and on November 7, 1975, Plaintiffs filed a claim for damages with the State Board of Control. That said claim was denied on December 23, 1975. That said claim was filed within one hundred (100) days of the death of MARY ELLEN MARTINEZ on August 1, 1975. That this action has been filed within six (6) months of the date said claim was denied.

III

That GEORGE MARTINEZ is the surviving father of MARY ELLEN MARTINEZ. PATRICIA MARTINEZ is the surviving mother of MARY ELLEN MARTINEZ. MICHELLE MARTINEZ is the surviving sister of MARY ELLEN MARTINEZ; MATTHEW MARTINEZ is the surviving brother of MARY ELLEN MARTINEZ and the Plaintiffs are the sole heirs at law of MARY ELLEN MARTINEZ, now deceased.

IV

That at all times herein mentioned, the Defendants, RAYMOND PROCUNIER, HENRY KERR, BERNARD FORMAN, CURTIS LYNUM, L. M. EDMAN, EDWARD BARLES and DOES I through L, Inclusive, were agents, servants and employees of the STATE OF CALIFORNIA, engaged in performing duties for the California Adult Authority and the California Department of Corrections.

V

That at all times herein mentioned, Defendant, THE STATE OF CALIFORNIA, was a sovereign state of the United States of America.

VI

That at all times herein mentioned, Plaintiffs were residents of the County of San Diego, State of California.

VII

That Plaintiffs are ignorant of the true names and capacities of Defendants stated herein as DOES I through L, inclusive, and Plaintiffs, therefore, sue these Defendants by such fictitious names and will amend this Complaint to show their true names when ascertained.

VIII

On August 1, 1975, MARY ELLEN MARTINEZ died in the County of San Diego, City of San Diego, State of California.

FIRST CAUSE OF ACTION

IX

Plaintiffs refer to paragraphs I, II, III, IV, VI, VII and VIII, inclusive, and by reference make them a part hereof.

X

That on December 12, 1969, one RICHARD JUNE-JORDAN THOMAS was found guilty of the attempted rape upon two (2) young females in an area known as Tecolote Canyon in the County of San Diego, State of California. That in the commission of the offense he caused the females' hands to be bound together and their mouths to be gagged, and did torture them while so bound and gagged.

XI

That subsequent to the conviction for the attack upon the two (2) females, RICHARD JUNE-JORDAN THOMAS was incarcerated in the STATE OF CALIFORNIA, in the institution known as Atascadero State Hospital, where he was examined by medical personnel and declared to be a Mentally Disordered Sex Offender not amenable to treated (*sic*).

XII

That RICHARD JUNE-JORDAN THOMAS was thereafter sentenced by the Superior Court in and for the County of San Diego to one to twenty (1-20) years in the State Prison system. The Court specifically expressed the view that parole should not be granted to this sex offender.

XIII

That after being within the STATE OF CALIFORNIA Prison System for approximately five (5) years without any current psychiatric evaluation, RICHARD JUNE-JORDAN THOMAS came before the Defendants, and each of them, requesting that he be paroled. That the Defendants, and each of them, had the duty to exercise reasonable care and discretion in determining when and if prisoners should be paroled to society.

XIV

That Defendants, and each of them, with knowledge that RICHARD JUNE-JORDAN THOMAS had attacked, tortured, bound and gagged two (2) females while he attempted to sexually violate them, had been examined medically and declared to be a Mentally Disordered Sex Offender, had been medically declared untreatable, had been sentenced to prison for one to twenty (1-20) years with a recommendation of no parole by the Superior Court of the County of San Diego, had received no psychiatric treatment of any kind for his sexual lust, had expressed an animosity and resentment towards his mother, had received no psychiatric evaluation within thirty (30) days of his request, did on March 10, 1975, release said RICHARD JUNE-JORDAN THOMAS to the care of his mother in the County of San Diego to be supervised by a "Parole Out-Patient Clinic."

XV

That the Defendants, and each of them, in so negligently permitting the release of said RICHARD JUNE-JORDAN THOMAS as above described, were not in possession of any facts upon which any person would or could exercise any

judgment, discretion or control by which a release could be permitted. Such conduct in releasing RICHARD JUNE-JORDAN THOMAS was outside the scope and course of their employment and not within the purview of either the California Adult Authority or the California Department of Corrections.

XVI

That subsequent to the release of RICHARD JUNE-JORDAN THOMAS as aforesaid and on August 1, 1975, in Tecolote Canyon in the County of San Diego, State of California, a female known as MARY ELLEN MARTINEZ was caught by RICHARD JUNE-JORDAN THOMAS, bound, gagged, tortured and killed in a sexual repetition of his depraved personality.

XVII

That as a direct and proximate result of the above described negligent conduct of the Defendants, and each of them, Plaintiffs have been deprived of the care, comfort, support, protection and society of MARY ELLEN MARTINEZ and will be so deprived in the future in the sum of One Million Dollars ($1,000,000.00).

SECOND CAUSE OF ACTION

XVIII

Plaintiffs refer to paragraphs I through IV, and VI through VIII; and paragraphs X through XIV, XVI and XVII of the First Cause of Action, inclusive, and by reference make them a part hereof.

XIX

That Defendants, and each of them, in permitting the ministerial act of release of RICHARD JUNE-JORDAN THOMAS as aforementioned, failed to comply with the requisite formalities upon which paroles must be granted pursuant to the administrative procedures of the California Adult Authority and California Department of Corrections in exercising their discretionary authority and were guilty of careless and reckless conduct.

XX

That the Defendants, and each of them, had a duty and obligation to comply with the California Penal Code in order to compile facts and data upon which a parole could be properly predicated and such discretionary conduct was a prerequisite to any ministerial act of release.

THIRD CAUSE OF ACTION

XXI

Plaintiffs refer to paragraphs I through IV, and VI through VIII; paragraphs X through XIV, XVI and XVII of the First Cause of Action; and paragraphs XIX and XX of the Second Cause of Action, inclusive, and by reference make them a part hereof.

XXII

That the Defendants, and each of them, knew, or in the exercise of ordinary care should have known that RICHARD JUNE-JORDAN THOMAS was a male person who had a propensity for engaging in cruel and sexual attacks upon

females and as such constituted a clear and present threat and danger to females who would commonly be in the area known as Tecolote Canyon in the County of San Diego, State of California.

XXIII

That the Defendants, and each of them, knew, or in the exercise of ordinary care should have known that young females commonly used the area known as Tecolote Canyon in the County of San Diego, State of California, and that said females were without protection from attack and molestation by males.

XXIV

That the Defendants, and each of them, knew, or should have known that the area known as Tecolote Canyon in the County of San Diego, State of California, was filled with ravines, gulches, patches of mesquite and underbrush that have previously been used by RICHARD JUNE-JORDAN THOMAS to commit his depraved and lustful acts of violence upon females.

XXV

That the Defendants, and each of them, did carelessly and negligently allow and permit RICHARD JUNE-JORDAN THOMAS access to the area known as Tecolote Canyon without warning females using the area of his presence or propensities to commit rape and attacks upon them. That said failure to warn permitted females to use the area when they ordinarily would not do so.

XXVI

That as a direct and proximate result of the above-described carelessness and negligence, MARY ELLEN MARTINEZ was killed as aforesaid.

FOURTH CAUSE OF ACTION

XXVII

Plaintiffs refer to paragraphs I through IV, and VI through VIII; paragraphs X through XIV, XVI and XVII of the First Cause of Action; paragraphs XIX and XX of the Second Cause of Action; and paragraphs XXII through XXVI of the Third Cause of Action, inclusive, and by reference make them a part hereof.

XXVIII

That Defendants, and each of them, willfully, wantonly, and maliciously failed to supervise RICHARD JUNE-JORDAN THOMAS and unreasonably exposed MARY ELLEN MARTINEZ to the risk of violent bodily harm and death.

XXIX

That as a result of said willful and wanton conduct, Plaintiffs are entitled to punitive damages to ensure that such conduct will not be practiced in the future in the sum of One Million Dollars ($1,000,000.00).

FIFTH CAUSE OF ACTION

XXX

Plaintiffs refer to paragraphs I through IV, and VI through VIII; paragraphs X through XVII of the First Cause of Action; paragraphs XIX and XX of the Second Cause of Action; paragraphs XXII through XXVI of the Third Cause of Action; and paragraphs XXVII through XXIX of the Fourth Cause of Action, inclusive, and by reference make them a part hereof.

XXXI

That this action arises under Title 42 of the U.S.C. §1983.

XXXII

That at all times herein mentioned, the Defendants, and each of them, were acting under color of State law, namely California Penal Code §§5075 and 5077.

XXXIII

That because of the recited facts as aforementioned, which said facts have been incorporated herein by reference, Plaintiffs have been deprived of the customs and usages of the rights and privileges of the STATE OF CALIFORNIA and secured by the Fifth and Fourteenth Amendments of the United States Constitution not to be deprived of life without due process.

XXXIV

That Plaintiffs allege that as the direct consequences and result of the acts of Defendants hereinbefore complained of, Plaintiffs have been deprived of the society, protection, services and support of Decedent, MARY ELLEN MARTINEZ.

XXXV

That as a result of being deprived of the right to life without due process of law, Plaintiffs are entitled to punitive damages to ensure that such conduct will not be practiced in the future in the sum of One Million Dollars ($1,000,000.00).

SIXTH CAUSE OF ACTION

XXXVI

Plaintiffs refer to paragraphs I through VIII, paragraphs X through XIV, XVI and XVII of the First Cause of Action; paragraphs XIX and XX of the Second Cause of Action; paragraphs XXII through XXVI of the Third Cause of Aciton; paragraphs XXVIII through XXIX of the Fourth Cause of Action; and paragraphs XXX through XXXV of the Fifth Cause of Action, inclusive, and by reference make them a part hereof.

XXXVII

That Defendant, STATE OF CALIFORNIA, subsequently learned of the unauthorized acts of its agents as alleged in the First Cause of Aciton. After having acquired such knowledge, said Defendant failed to take the necessary action to correct said acts, thereby ratifying and condoning said acts and, accordingly, acted in conjunction with the other Defendants as hereinafter alleged.

XXXVIII

That at all times mentioned herein, Defendants, and each of them, knew of the dangerous propensities of convicted felon, RICHARD JUNE-JORDAN THOMAS.

XXXIX

That Defendants, and each of them, were notified and were cognizant of said dangerous propensities both before the granting of parole and subsequent to the granting of parole by various psychiatrists, psychologists and other individuals.

XL

That Defendants, and each of them, having knowledge of the dangerous propensities of RICHARD JUNE-JORDAN THOMAS willfully and maliciously failed to correct the negligent paroling of said convicted felon which was outside the scope and course of their employment, and willfully and maliciously failed to supervise said convicted felon subsequent to the granting of parole; and by such willful failure, Defendants were unreasonably exposing MARY ELLEN MARTINEZ to probably (*sic*) serious harm.

XLI

That Defendants, and each of them, having knowledge of the dangerous propensities of RICHARD JUNE-JORDAN THOMAS, willfully and maliciously failed to warn females using the area known as Tecolote Canyon of his presence or propensities to commit rape and attacks upon them, and by such willful and malicious failure, Defendants were unreasonably exposing MARY ELLEN MARTINEZ to probable serious harm.

XLII

That Defendants, and each of them, having knowledge of the dangerious (*sic*) propensities of convicted felon, RICHARD

JUNE-JORDAN THOMAS, did in such reckless and wanton disregard of the possible consequences to Plaintiffs by reason thereof, unreasonably expose MARY ELLEN MARTINEZ to probable serious harm.

XLIII

That Defendants, and each of them, did the things hereinabove alleged willfully, maliciously and in reckless and wanton disregard of the possible consequences to Plaintiffs by reason thereof.

XLIV

That as a result of said conduct, Plaintiffs are entitled to punitive damages to ensure that such conduct will not be practiced in the future in the sum of One Million Dollars ($1,000,000.00).

WHEREFORE, Plaintiffs pray for judgment as follows:

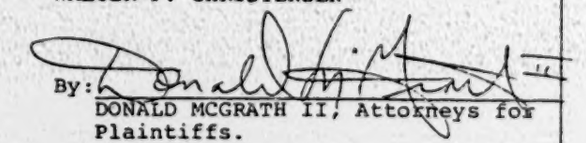
1. For damages in the sum of One Million Dollars ($1,000,000.00);
2. For punitive damages in the sum of One Million Dollars ($1,000,000.00);
3. For costs of suit herein incurred; and
4. For such other and further relief as the Court may deem proper.

DATED: May 25, 1976.

THOMPSON, BUNKER, SULLIVAN & MCGRATH
A Professional Corporation

In association with

WALTER P. CHRISTENSEN

By: 
DONALD MCGRATH II, Attorneys for Plaintiffs.

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SUPERIOR COURT OF THE STATE OF CALIFOKNIA

FOR THE COUNTY OF SAN DIEGO

GEORGE MARTINEZ, PATRICIA MARTINEZ, MICHELLE MARTINEZ by her Guardian Ad Litem GEORGE MARTINEZ, and MATTHEW MARTINEZ by his Guardian Ad Litem GEORGE MARTINEZ,

Plaintiffs,

v.

THE STATE OF CALIFORNIA, RAYMOND PROCUNIER, HENRY KERR, BERNARD FORMAN, CURTIS LYNUM, L.M. EDMAN, EDWARD BARLES, AND DOES I THROUGH L, INCLUSIVE,

Defendants.

No. 382460

NOTICE OF DEMURRER TO COMPLAINT; DEMURRER TO COMPLAINT; POINTS AND AUTHORITIES IN SUPPORT THEREOF

Date: July 21, 1976
Department 11
Time: 1:30 p.m.

TO: PLAINTIFFS AND TO THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on Wednesday, July 21, 1976, at 1:30 p.m., or as soon thereafter as counsel may be heard in Department 11 of the above entitled court, defendants State of

California, Raymond Procunier, Henry Kerr, Bernard Forman, Curtis Lynum, L.M. Edman and Edward Barles, and each of them, will demur to the Complaint For Damages For Wrongful Death And For Civil Rights Violation (hereinafter referred to as complaint) on the following ground:

DEMURRER TO COMPLAINT

Defendants demur to each and every cause of action of the complaint on the ground that neither the complaint nor any cause of action thereof sets forth facts sufficient to constitute a cause of action.

WHEREFORE, defendants hereby request that this demurrer be sustained without leave to amend and that defendants be awarded their costs of suit herein incurred.

Dated: June 28, 1976

Evelle J. Younger, Attorney General

Jeffrey T. Miller,
Deputy Attorney General

Attorneys for Defendants

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SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO

GEORGE MARTINEZ, PATRICIA MARTINEZ, MICHELLE MARTINEZ by her Guardian Ad Litem GEORGE MARTINEZ, and MATTHEW MARTINEZ by his Guardian Ad Litem GEORGE MARTINEZ,

Plaintiffs,

vs.

THE STATE OF CALIFORNIA, RAYMOND PROCUNIER, HENRY KERR, BERNARD FORMAN, CURTIS LYNUM, L. M. EDMAN, EDWARD BARLES, and DOES I through L, Inclusive,

Defendants.

NO. 382460

MINUTE ORDER

Demurrers are sustained to causes of action 1, 2, 3, 4, 5 and 6. Leave to amend causes of action 1 and 6 is granted, but denied as to 2, 3, 4, and 5.

It is clear that a public employee is not liable for an injury resulting from his discretionary acts, even if the discretion is abused (as, for example, by failing to get needed psychological reports before acting) Government Code Section 820.2. Plaintiff's counsel seek to distinguish between discretionary and ministerial phases of the parole process. Such distinction was rejected in *State of California v. Superior Court (American Indemnity Company)*, 37 Cal. App. 3d 1023 (1974).

As to the allegations that all teenage girls in the "vicinity" of Tecolote Canyon had a right to be warned of the presence of a sex maniac, *American Indemnity Co. supra,* is also controlling. "The instant case, unlike *Johnson* does not involve a situation where, after there has been an actual release, there is a *continuing relationship* between the State *and some particular member of the public.*" (*Ibid* at 1027, first emphasis that of the Court, emphasis supplied to last seven words.)

This Court does not find that the use of the word "determining" so distinguishes Government Code Section 845.8(a) from subsection (b) as to make *County of Sacramento v. Superior Court,* 8 Cal. 3d 479 inapplicable. In *Webster's Third International Dictionary,* Unabridged 1971 Edition, the first definition of "determine" is ". . . to fix conclusively or authoritatively," the second definition is ". . . to settle a question or controversy. . ." and the third is ". . . to come to a decision concerning *as the result of investigation or reasoning* . . ." Only if the third definition is applied should we conclude that "determining" means to use discretion.

The Federal Civil Rights Act, 42 USC § 1983 provides wrongful death benefits ". . .if such is permitted by state law." (Plaintiff's Memorandum of Points and Authorities, p. 15) Since this Court concludes that State law does not permit this action, none accrues under federal law.

Finally, the allegations of causes of action 1 and 6 are contradictory and conflicting as to their meaning. Paragraph IV, incorporated into the first and sixth causes of action, alleges that the individual defendants were State agents, at all times *engaged* in performing duties for the State. Paragraph XIV alleges that defendants and each of them (*e.g.* the State) knew

the assassin had not been psychologically evaluated *before* he was released; Paragraph XV alleges that "their" (without definition) conduct was outside the scope of their employment and in the sixth cause of action, Paragraph XV is not incorporated.

DATED: 1 SEP 1976.

JUDGE OF THE SUPERIOR COURT

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IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SAN DIEGO

GEORGE MARTINEZ, PATRICIA MARTINEZ, MICHELLE MARTINEZ, by her Guardian ad Litem, GEORGE MARTINEZ, and MATTHEW MARTINEZ, by his Guardian ad Litem, GEORGE MARTINEZ, Plaintiffs, vs. THE STATE OF CALIFORNIA, RAYMOND PROCUNIER, HENRY KERR, BERNARD FORMAN, CURTIS LYNUM, L. M. EDMAN, EDWARD BARLES, and DOES I through L, Inclusive, Defendants.	NO. 382460 FIRST AMENDED COMPLAINT FOR DAMAGES FOR WRONGFUL DEATH AND FOR CIVIL RIGHTS VIOLATION

Come now the Plaintiffs and with leave of Court files their First Amended Complaint For Damages by amending the First Cause of Action and the Sixth Cause of Action and repleading in full Causes of Action Second, Third, Fourth and Fifth.

I

That plaintiff, MICHELLE MARTINEZ, age 15, and Plaintiff, MATTHEW MARTINEZ, age 13, are minors and by Order of the above-entitled Court duly given and made on May 25, 1976, Plaintiff, GEORGE MARTINEZ, was duly appointed Guardian ad Litem of said minors for the purposes of bringing this action and ever since has been, and still is, the duly appointed acting Guardian ad Litem of said minors.

II

That prior to the commencement of this action and on November 7, 1975, Plaintiffs filed a claim for damages with the State Board of Control. That said claim was denied on December 23, 1975. That said claim was filed within one hundred (100) days of the death of MARY ELLEN MARTINEZ on August 1, 1975. That this action has been filed within six (6) months of the date said claim was denied.

III

That GEORGE MARTINEZ is the surviving father of MARY ELLEN MARTINEZ. PATRICIA MARTINEZ is the surviving mother of MARY ELLEN MARTINEZ. MICHELLE MARTINEZ is the surviving sister of MARY ELLEN MARTINEZ; MATTHEW MARTINEZ is the surviving brother of MARY ELLEN MARTINEZ and the Plaintiffs are the sole heirs at law of MARY ELLEN MARTINEZ, now deceased.

IV

That at all times herein mentioned, the Defendants, RAYMOND PROCUNIER, HENRY KERR, BERNARD FORMAN, CURTIS LYNUM, L. M. EDMAN, EDWARD BARLES and DOES 1 through L, Inclusive, were agents, servants and employees of the STATE OF CALIFORNIA, engaged in performing duties for the California Adult Authority and the California Department of Corrections.

V

That at all times herein mentioned, Defendant, THE STATE OF CALIFORNIA, was a sovereign state of the United States of America.

VI

That at all times herein mentioned, Plaintiffs were residents of the County of San Diego, State of California.

VII

That Plaintiffs are ignorant of the true names and capacities of Defendants stated herein as DOES 1 through L, inclusive, and Plaintiffs, therefore, sue these Defendants by such fictitious names and will amend this Complaint to show their true names when ascertained.

VIII

On August 1, 1975, MARY ELLEN MARTINEZ died in the County of San Diego, City of San Diego, State of California.

FIRST CAUSE OF ACTION

IX

Plaintiffs refer to Paragraphs I, II, III, VI, VII and VIII, inclusive, and by reference make them a part hereof.

X

That on December 12, 1969, one RICHARD JUNE-JORDAN THOMAS was found guilty of the attempted rape upon two (2) young females in an area known as Tecolote Canyon in the County of San Diego, State of California. That in the commission of the offense he caused the females' hands to be bound together and their mouths to gagged, and did tortue them while so bound and gagged.

XI

That subsequent to the conviction for the attack upon the two (2) females, RICHARD JUNE-JORDAN THOMAS was incarcerated in the STATE OF CALIFORNIA, in the institution known as Atascadero State Hospital, where he was examined by medical personnel and declared to be a Mentally Disordered Sex Offender not amenable to treatment.

XII

That RICHARD JUNE-JORDAN THOMAS was thereafter sentenced by the Superior Court in and for the County of San Diego to one to twenty (1-20) years in the State Prison System. The Court specifically expressed the view that parole should not be granted to this sex offender.

XIII

That after being within the STATE OF CALIFORNIA Prison System for approximately five (5) years without any current psychiatric evaluation, RICHARD JUNE-JORDAN THOMAS came before the Defendants, and each of them, requesting that he be paroled. That the Defendants, and each of them, had the duty to exercise reasonable care and discretion in determining when and if prisoners should be paroled to society.

XIV

That the individually named defendants, with knowledge that RICHARD JUNE-JORDAN THOMAS had attacked, tortured, bound and gagged two (2) females while he attempted to sexually violate them, had been examined medically and declared to be a Mentally Disordered Sex Offender, had been medically declared untreatable, had been sentenced to prison for one to twenty (1-20) years with a recommendation of no parole by the Superior Court of the County of San Diego, had received no psychiatric treatment of any kind for his sexual lust, had expressed an animosity and resentment towards his mother, had received no psychiatric evaluation within thirty (30) days of his request, did on March 10, 1975, release said RICHARD JUNE-JORDAN THOMAS to the care of his mother in the County of San Diego to be supervised by a "Parole Out-Patient Clinic".

XV

That the individually named defendants' conduct was tortious in permitting the release of said RICHARD JUNE-JORDAN THOMAS because of the knowledge of the facts and circumstances set forth in Paragraph XIV of this Complaint. That no

reasonable and prudent person would or could be able to exercise any discretion or judgment or make any determination to release or parole such a person. That the exercise of discretion and judgment can only be performed while an individual is acting within the course and scope of his employment. The release of this assasin under circumstances where reasonable and prudent men could not and would not release him constitutes conduct that is outside the course and scope of these individual defendants' duties and is not within the purview of any conduct that would or could be anticipated by the California Adult Authority or the California Department of Corrections.

XVI

That subsequent to the release of RICHARD JUNE-JORDAN THOMAS as aforesaid and on August 1, 1975, in Tecolote Canyon in the County of San Diego, State of California, a female known as MARY ELLEN MARTINEZ was caught by RICHARD JUNE-JORDAN THOMAS, bound, gagged, tortured and killed in a sexual repetition of his depraved personality.

XVII

That as a direct and proximate result of the above described negligent conduct of the Defendants, and each of them, Plaintiffs have been deprived of the care, comfort, support, protection and society of MARY ELLEN MARTINEZ and will be so deprived in the future in the sum of One Million Dollars ($1,000,000.00).

SECOND CAUSE OF ACTION

XVIII

Plaintiffs refer to paragraphs I through IV, and VI through VIII; and paragraphs X through XIV, XVI and XVII of the First Cause of Action, inclusive, and by reference make them a part hereof.

XIX

That Defendants, and each of them, in permitting the ministerial act of release of RICHARD JUNE-JORDAN THOMAS as aforementioned, failed to comply with the requisite formalities upon which paroles must be granted pursuant to the administrative procedures of the California Adult Authority and California Department of Corrections in exercising their discretionary authority and were guilty of careless and reckless conduct.

XX

That the Defendants, and each of them, had a duty and obligation to comply with the California Penal Code in order to compile facts and date upon which a parole could be properly predicated and such discretionary conduct was a prerequisite to any ministerial act of release.

THIRD CAUSE OF ACTION

XXI

Plaintiffs refer to Paragraphs I through IV, and VI through VIII; Paragraphs X through XIV, XVI and XVII of the First Cause of Action; and Paragraphs XIX and XX of the Second

Cause of Action, inclusive, and by reference make them a part hereof.

XXII

That the Defendants, and each of them, knew, or in the exercise of ordinary care should have known that RICHARD JUNE-JORDAN THOMAS was a male person who had a propensity for engaging in cruel and sexual attacks upon females and as such constituted a clear and present threat and danger to females who would commonly be in the area known as Tecolote Canyon in the County of San Diego, State of California.

XXIII

That the Defendants, and each of them, knew, or in the exercise of ordinary care should have known that young females commonly used the area known as Tecolote Canyon in the County of San Diego, State of California, and that said females were without protection from attack and molestation by males.

XXIV

That the Defendants, and each of them, knew, or should have known that the area known as Tecolote Canyon in the County of San Diego, State of California, was filled with ravines, gulches, patches of mesquite and underbrush and have previously been used by RICHARD JUNE-JORDAN THOMAS to commit his depraved and lustful acts of violence upon females.

XXV

That the Defendants, and each of them, did carelessly and negligently allow and permit RICHARD JUNE-JORDAN THOMAS access to the area known as Tecolote Canyon without warning females using the area of his presence or propensities to commit rape and attacks upon them. That said failure to warn permitted females to use the area when they ordinarily would not do so.

XXVI

That as a direct and proximate result of the above-described carelessness and negligence, MARY ELLEN MARTINEZ was killed as aforesaid.

FOURTH CAUSE OF ACTION

XXVII

Plaintiffs refer to Paragraphs I through IV, and VI through VIII; Paragraphs X through XIV, XVI and XVII of the First Cause of Action; Paragraphs XIX and XX of the Second Cause of Action; and Paragraphs XXII through XXVI of the Third Cause of Action, inclusive, and by reference make them a part hereof.

XXVIII

That Defendants, and each of them, wilfully, wantonly, and maliciously failed to supervise RICHARD JUNE-JORDAN THOMAS and unreasonably exposed MARY ELLEN MARTINEZ to the risk of violent bodily harm and death.

XXIX

That as a result of the wilful and wanton conduct, Plaintiffs are entitled to punitive damages to ensure that such conduct will not be practiced in the future in the sum of One Million Dollars ($1,000,000.00).

FIFTH CAUSE OF ACTION

XXX

Plaintiffs refer to Paragraphs I through IV, and VI through VIII; Paragraphs X through XVII of the First Cause of Action; Paragraphs XIX and XX of the Second Cause of Action; Paragraphs XXII through XXVI of the Third Cause of Action; and Paragraphs XXVII through XXIX of the Fourth Cause of Action, inclusive, and by reference make them a part hereof.

XXXI

That this action arises under Title 42 of the U.S.C. §1983.

XXXII

That at all times herein mentioned, the Defendants, and each of them, were acting under color of State Law, namely, California Penal Code §§5075 and 5077.

XXXIII

That because of the recited facts as aforementioned, which said facts have been incorporated herein by reference, Plaintiffs have been deprived of the customs and usages of the rights and privileges of the STATE OF CALIFORNIA and secured by the Fifth and Fourteenth Amendments of the United States Constitution not to be deprived of life without due process.

XXXIV

That Plaintiffs allege that as the direct consequences and result of the acts of Defendants hereinbefore complained of, Plaintiffs have been deprived of the society, protection, services and support of Decedent, MARY ELLEN MARTINEZ.

XXXV

That as a result of being deprived of the right to life without due process of law, Plaintiffs are entitled to punitive damages to ensure that such conduct will not be practiced in the future in the sum of One Million Dollars ($1,000,000.00).

SIXTH CAUSE OF ACTION

XXXVI

Plaintiffs refer to Paragraphs I, II, III, V, VI, VII and VIII. Paragraphs X through XVII of the First Cause of Action; Paragraphs XIX and XX of the Second Cause of Action; Paragraphs XXII through XXVI of the Third Cause of Action; Paragraphs XXVIII through XXIX of the Fourth Cause of Action; and Paragraphs XXX through XXXV of the Fifth Cause of Action, inclusive, and by reference make them a part hereof.

XXXVII

That Defendant, STATE OF CALIFORNIA, subsequently learned of the unauthorized acts of its agents as alleged in the First Cause of Action. After having acquired such knowledge, said Defendant failed to take the necessary action to correct said acts, thereby ratifying and condoning said acts and,

accordingly, acted in conjunction with the other Defendants as hereinafter alleged.

XXXVIII

That at all times mentioned herein, Defendants, and each of them, knew of the dangerous propensities of convicted felon, RICHARD JUNE-JORDAN THOMAS.

XXXIX

That Defendants, and each of them, were notified and were cognizant of said dangerous propensities both before the granting of the parole and subsequent to the granting of parole by various psychiatrists, psychologists and other individuals.

XL

That Defendants, and each of them, having knowledge of the dangerous propensities of RICHARD JUNE-JORDAN THOMAS wilfully and maliciously failed to correct the negligent paroling of said convicted felon which was outside the scope and course of their employment, and wilfully and maliciously failed to supervise said convicted felon subsequent to the granting of parole; and by such wilful failure, Defendants were unreasonably exposing MARY ELLEN MARTINEZ to probably (*sic*) serious harm.

XLI

That Defendants, and each of them, having knowledge of the dangerous propensities of RICHARD JUNE-JORDAN THOMAS, wilfully and maliciously failed to warn females using the area known as Tecolote Canyon of his presence or propensitites (*sic*) to commit rape and attacks upon them, and by such wilful and malicious failure, Defendants were

unreasonably exposing MARY ELLEN MARTINEZ to probable serious harm.

XLII

That Defendants, and each of them, having knowledge of the dangerous propensities of convicted felon, RICHARD JUNE-JORDAN THOMAS, did in such reckless and wanton disregard of the possible consequences to Plaintiffs by reason thereof, unreasonably expose MARY ELLEN MARTINEZ to probable serious harm.

XLIII

That Defendants, and each of them, did the things hereinabove alleged wilfully, maliciously and in reckless and wanton disregard of the possible consequences to Plaintiffs by reason thereof.

XLIV

That as a result of said conduct, Plaintiffs are entitled to punitive damages to ensure that such conduct will not be practiced in the future in the sum of One Million Dollars ($1,000,000.00).

WHEREFORE, Plaintiffs pray for judgment as follows:

1. For damages in the sum of One Million Dollars ($1,000,000.00);
2. For punitive damages in the sum of One Million Dollars ($1,000,000.00);
3. For costs of suit herein incurred; and

4. Such such (*sic*) other and further relief as the Court may deem proper.

DATED: September 14, 1976.

WALTER P. CHRISTENSEN

Walter P. Christensen

In Association With

DONALD McGRATH II
THOMPSON, BUNKER, SULLIVAN & McGRATH
A Professional Corporation

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Thompson, Bunker, Sullivan & McGrath
A Professional Corporation

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN DIEGO

GEORGE MARTINEZ, et al., Plaintiffs, v. THE STATE OF CALIFORNIA, et al., Defendants.	No. 382460 NOTICE OF DEMURRER TO FIRST AMENDED COMPLAINT; DEMURRER TO FIRST AMENDED COMPLAINT; POINTS AND AUTHORITIES IN SUPPORT THEREOF Date: November 8, 1976 Time: 1:30 p.m. Department 11

TO: PLAINTIFFS AND TO THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on Monday, November 8, 1976, at 1:30 p.m., or as soon thereafter as counsel may be heard in Department 11 of the above entitled Court, defendants State of California, Raymond Procunier, Henry Kerr, Bernard Formun, Curtis Lynum, L.M. Edman and Edward Barles, and each of them, will demur to the First Amended Complaint For Damages For Wrongful Death And For Civil Rights Violation (hereinafter referred to as first amended complaint) on the following ground:

DEMURRER TO FIRST AND SIXTH CAUSES OF ACTION OF THE FIRST AMENDED COMPLAINT

Defendants demur to the First and Sixth Causes of Action of the first amended complaint on the grounds that neither of those two causes of action sets forth facts sufficient to constitute a cause of action.

WHEREFORE, defendants hereby request that this demurrer be sustained without leave to amend and that defendants be awarded their costs of suit herein incurred.

Dated: October 13, 1976.

Evelle J. Younger, Attorney General

Jeffrey T. Miller,
Deputy Attorney General

Attorneys for Defendants

EVELLE J. YOUNGER, Attorney General
JEFFREY T. MILLER,
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110 West A Street, Suite 600
San Diego, California 92101
Telephone: (714) 236-7762

Attorneys for Defendants

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN DIEGO

GEORGE MARTINEZ, et al., Plaintiffs, v. THE STATE OF CALIFORNIA, et al., Defendants.	No. 382460 ORDER SUSTAINING DEMURRERS AND JUDGMENT OF DISMISSAL THEREON

On August 26, 1976, the demurrer of defendants State of California, Raymond Procunier, Henry Kerr, Bernard Formun, Curtis Lynum, L.M. Edman and Edward Barles came on regularly for hearing before the Honorable Louis M. Welsh, Judge Presiding. Plaintiffs appeared through Thompson, Sullivan, McGrath & McDonald by Donald McGrath II, in association with Walter P. Christensen. Defendants appeared through Evelle J. Younger, Attorney General of the State of California by Jeffrey T. Miller, Deputy Attorney General of the State of California. The matter was argued and submitted on the basis of said argument and written points and authorities

submitted by all parties. The demurrer of said defendants was sustained without leave to amend with respect to the Second, Third, Fourth and Fifth Causes of Action, and sustained with leave to amend with respect to the First and Sixth Causes of Action.

On November 8, 1976, the demurrer of defendants State of California, Raymond Procunier, Henry Kerr, Bernard Formun, Curtis Lynum, L.M. Edman and Edward Barles as to the First and Sixth Causes of Action, as amended, was heard before the Honorable Douglas R. Woodworth, Judge Presiding. Plaintiffs appeared through Thompson, Sullivan, McGrath & McDonald by Donald McGrath II, in association with Walter P. Christensen. Defendants appeared through Evelle J. Younger, Attorney General of the State of California by Jeffrey T. Miller, Deputy Attorney General of the State of California. Written points and authorities were filed by all parties and the matter was argued on behalf of all parties.

GOOD CAUSE APPEARING THEREFOR, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the demurrers of defendants State of California, Raymond Procunier, Henry Kerr, Bernard Formun, Curtis Lynum, L.M. Edman and Edward Barles are sustained without leave to amend as to the Second, Third, Fourth and Fifth Causes of Action of the Complaint For Damages For Wrongful Death And For Civil Rights Violation, and without leave to amend as to the First and Sixth Causes of Action of the First Amended Complaint For Damages For Wrongful Death And For Civil Rights Violation.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the above entitled action be dismissed, with prejudice, and is hereby so dismissed.

Dated:_____

IT IS SO ORDERED _____ JUDGE OF THE SUPERIOR COURT

APPROVED AS TO FORM AND CONTENT

THOMPSON, SULLIVAN, McGRATH & McDONALD
by DONALD McGRATH II

in association with

WALTER P. CHRISTENSEN

15
16

by:

DONALD McGRATH II

COURT OF APPEAL - FOURTH DIST.
FILED
SEP 22 1978
ROBERT L. FORD, Clerk
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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

GEORGE MARTINEZ, et al., Plaintiffs and Appellants, v. THE STATE OF CALIFORNIA, et al., Defendants and Respondents.	4 Civ. No. 16386 (Superior Court No. 382460)

APPEAL from a judgment of the Superior Court of San Diego County. Louis M. Welsh and Douglas R. Woodworth, Judges. Affirmed.

George Martinez appeals the judgment following an order sustaining State's demurrer without leave to amend.

Richard June-Jordan Thomas was convicted on December 12, 1969 of attempted forcible rape. He was sent to Atascadero State Hospital for six months where he was designated a "Mentally Disordered Sex Offender" (MDSO), not amenable to treatment. He was sentenced to prison for from six months to 20 years in April 1970 and was paroled five years later on condition he appear regularly at a "parole out-patient clinic." Five months after his release Thomas kidnapped and murdered Mary Ellen Martinez, a 15 year old.

George Martinez filed suit for his daughter's wrongful death and for civil rights violations in six causes of action alleging

defendants were negligent in releasing Thomas, failed to supervise Thomas properly while he was on parole, violated the Federal Civil Rights Act[1]/ and failed to warn females Thomas was loose. He sought compensatory and punitive damages. We consider each cause of action in turn.

The first cause of action alleged the defendants were employed by the California Department of Corrections and the Adult Authority, had a duty to be reasonably careful in paroling prisoners and had breached that duty because no prudent, reasonable person knowing Thomas' history would have released him. Martinez says governmental immunity provided by Government Code section 845.8(a)[2]/ does not apply because the employees here were acting outside the course and scope of their employment. However, even if these employees abused their discretion by granting parole knowing Thomas had tortured two girls in attempting to rape them, was an untreatable MDSO with a recommendation of no parole, had

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FOOTNOTE 1: 42 U.S.C.A. §1983 states: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

FOOTNOTE 2: This statute states: "Neither a public entity nor a public employee is liable for: (a) Any injury resulting from determining whether to parole or release a prisoner or from determining the terms and conditions of his parole or release or from determining whether to revoke his parole or release. (b) Any injury caused by: (1) An escaping or escaped prisoner; (2) An escaping or escaped arrested person; or (3) A person resisting arrest."

received no psychiatric treatment during his incarceration and had no psychiatric evaluation after his request this does not make them liable. The statute by its own terms releases an employee from any liability stemming from the exercise of his discretion in determining whether a prisoner should be released (see Gov. Code §820.2; see *State of California v. Superior Court*, 37 Cal. App. 3d 1023, 1026).

As for the charge these employees were not acting within the scope of their employment, there are no allegations they were doing anything other than what they were hired to do, that is, determine when prisoners are to be paroled (*Burgdorf v. Funder*, 246 Cal. App. 2d 443, 448).

In his second cause of action Martinez says the State's employees were negligent in "performing ministerial acts of release." He claims Government Code section 845.8(b) grants employees absolute immunity for discretionary and ministerial acts when dealing with escapees, while section 845.8(a) covers only those injuries flowing from "determinations" about parole (see fn. 2; *County of Sacramento v. Superior Court*, 8 Cal. 3d 479). In short, he says section 845.8(a) confers discretionary immunity but not absolute immunity. In making a decision to release a prisoner the actual decision, including the ministerial act of applying established rules and regulations to the particular case in question, is covered by governmental immunity (*State of California v. Superior Court, supra*, 37 Cal. App. 3d 1023, 1027-1028). Not covered are ministerial acts in carrying out the decision to release the person, and an allegation of negligence must be determined on a case-by-case basis (*Johnson v. State of California*, 69 Cal. 2d 782, 797; see *Morgan v. County of Yuba*, 230 Cal. App. 2d 938, 942). In this count Martinez does not allege negligence occuring after the decision

to release Thomas. The complaint, by reference, incorporates allegations from the first count that: the employees knew Thomas had tortured the girls during the attempted rapes; he had been declared an untreatable MDSO; it had been recommended he not be paroled; he had received no psychiatric treatment; and, had no psychiatric evaluation within 30 days of his request. All of these acts or omissions are part of the discretionary act of releasing a prisoner and come within the government's immunity.

In his third cause of action Martinez says the State was negligent in failing to warn females using Tecolote Canyon of the danger now that Thomas was released. At oral argument he agreed this count should be dismissed because there was no continuing relationship between the State and the victim (*Whitcombe v. County of Yolo*, 73 Cal. App. 3d 698, 713; *Anderson v. State of California*, 83 Cal. App. 3d 188, 196).

In his fourth cause of action Martinez claims the State wantonly, wilfully and maliciously failed to supervise Thomas. The decision on what conditions to impose upon a parolee including, for example, the imposition of a certain amount of supervision is part of the determination in section 845.8(a) which is immune from liability. However, supervision of a parolee consists of the "ministerial implementation of correctional programs which can hardly . . . be isolated from discretionary judgments in adopting such programs." (See *County of Sacramento v. Superior Court, supra*, 8 Cal. 3d 479, 485). Thus, for correctional activities, both discretionary decisions and their ministerial implementation come under the blanket of immunity (*Whitcombe v. County of Yolo, supra*, 73 Cal. App. 3d 698, 714) and Martinez has not stated a cause of action.

Martinez's fifth cause of action alleges violation of the Federal Civil Rights Act (see fn. 1), saying the acts of the individual respondents under Penal Code sections 5075 and 5077[3]/ caused and deprived Mary Ellen of her life and liberty. He points out that governmental immunity is not an absolute bar to such a suit (*Kletschka v. Driver*, 411 F. 2d 436, 448). However, official acts are privileged if they were done within the scope of their official duties (*Ahlstrand v. Lethert*, 319 F. Supp. 283, 284). As members of the Adult Authority, they are performing quasi-judicial functions when they make determinations regarding parole and are immune from suit under the Civil Rights Act (*Fitzgerald v. Procunier*, 393 F. Supp. 335, 343).

Martinez claims Mary Ellen's death resulted from actions and omissions above and beyond the actual processing of applications for parole, such as the failure to warn, and the failure to supervise Thomas. In addition, he argues that public policy considerations support the application of a restricted immunity with regard to civil rights actions brought by injured citizens. We weigh his arguments propounding liability against the local rule of immunity (*Kletschka v. Driver, supra*, 411 F. 2d 436, 448). The factors Martinez cites against absolute immunity are: an official who acts maliciously should be liable; it may not be in the public's interest always to have an official execute his duties with the utmost zeal; other social values, for example, the right to life and physical safety, may be more important than

FOOTNOTE 3: Section 5075 concerns the members, appointment, term, vacancies and qualifications of persons on the Adult Authority while section 5077 deals with granting and revoking of parole by the Adult Authority.

immunity; and indemnity by the State reduces the consequences of the liability of public officials. However, there are no facts here to show malice. Thomas was eligible for parole; the members of the Adult Authority determined he was ready for it. There is no sure formula for the members to know when a convict is rehabilitated and ready to reenter society. Yet it is important for the well-being of both society and the individual, to release persons as soon as they are rehabilitated. It is to society's advantage to try a variety of rehabilitative efforts and to use the maximum flexibility in facilitating the individual's reentry into society. In order to accomplish these aims it is necessary for public officials to make these decisions without fear they will be liable if they are wrong (see *Whitcombe v. County of Yolo, supra*, 73 Cal. App. 3d 698, 710, fn. 11, 716). There is no liability for these injuries as pleaded under the Civil Rights Act.

In his sixth cause of action Martinez charges the State was negligent in failing to revoke Thomas' parole, supervise him properly and warn young females after it learned of its agents' unauthorized acts in releasing him. Since the acts of its employees are covered by governmental immunity, as discussed earlier, the State is not liable.

Martinez says the statute, Government Code section 845.8(a), is unconstitutional because it permits the deprivation of life, a fundamental right, without due process. He suggests the statute, if it confers absolute immunity, encouraged the actions resulting in Mary Ellen's death and, thus, requires a compelling state interest. However, the Legislature has broad powers to control governmental tort liability limited only by the rule it not act arbitrarily (*Reed v. City & County of San Francisco*, 237 Cal. App. 2d 23, 24). The California Tort Claims Act as a whole

(Gov. Code §§810 et seq.) has been found constitutional (*Datil v. City of Los Angeles*, 263 Cal. App. 2d 655, 660-661). The stated purpose of section 845.8(a) is to allow correctional personnel to make determinations of release or parole unfettered by any fear of tort liability (Law Rev. Com. Comment). To impose tort liability would have a chilling effect on the decision making process, impede implementation of trial release programs and prolong incarceration unjustifiably for many prisoners. There is a rational relationship between the State's purposes and the statute.

Martinez says the trial court abused its discretion in sustaining the demurrers without leave to amend. However, leave to amend is properly denied when the facts are not in dispute, the nature of the claim is clear but there is no liability under substantive law (*Sackett v. Wyatt*, 32 Cal. App. 3d 592, 603). Here the only questions were legal ones: whether the immunity of Government Code section 845.8(a) applied, whether *Johnson v. State of California, supra*, 69 Cal. 2d 782, 797) applied, whether the Federal Civil Rights Act applied and whether the statute was constitutional. Under the facts as stated there is no liability here and it would be futile to permit further amendment.

The judgment is affirmed.

Brown
P.J.

WE CONCUR:

Regan
J.

Whiener
J.

COURT OF APPEAL - FOURTH DIST.
FILED
OCT 12 1978
ROBERT L. FORD, Clerk
W. Deeton
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IN THE COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

GEORGE MARTINEZ, et al., Plaintiffs and Appellants, v. THE STATE OF CALIFORNIA, et al., Defendants and Respondents.	4 Civ. No. 16386 (Superior Court No. 382460)

[Modification of Opinion.]

THE COURT:

The opinion in the above entitled matter filed on September 22, 1978 is modified as follows:

Starting with page 5, line 6, delete:

> "*Anderson v. State of California*, 83 Cal. App. 3d 188, 196"; and on the same page, second paragraph, line 7, the word "which" in the quote should be in brackets as it is a substitution for the word "however," so the quote reads: "ministerial implementation of correctional programs [which] can hardly . . ."

CLERK'S OFFICE, SUPREME COURT
4250 STATE BUILDING

SAN FRANCISCO, CALIFORNIA 94102

NOV 15 1978

I have this day filed Order

HEARING DENIED

In re: 4 Civ. *No.* 16386

Martinez

vs.

State of California

Respectfully,

G. E. BISHEL
Clerk

93421-877 8-78 4M OSP